In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 294

HARRY LEVY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed the order of the district court without written opinion (R. 56a).[1] The memorandum opinion of the district court (R. 2a–4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1966. The petition for a writ of certiorari was filed on June 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record filed with the Clerk of this Court consists of petitioner's Appendix filed in the court of appeals and supplemental papers, all bound into a single volume designated as "R."

QUESTION PRESENTED

Whether the district court order directing petitioner to pay $500 a month toward satisfaction of the unpaid part of a criminal fine was proper in the circumstances of this case.

STATUTE INVOLVED

Section 5226 of the New York Civil Practice Law and Rules provides:

> Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

STATEMENT

On April 23, 1947, petitioner entered a plea of guilty in the United States District Court for the Southern District of New York to charges of selling and conspiring to sell textiles in violation of price regulations of the Office of Price Administration. He was sentenced to imprisonment for a period of one year and a day on each of 83 counts, the terms to run concurrently, and fined a total of $151,500.00. After petitioner's release from custody on parole [2] he began paying his fine in monthly installments of $40 to $50 (R. 9a).

On August 23, 1965, after petitioner's probation officer had repeatedly urged him to increase payments toward the fine (R. 7a), the United States moved in the United States District Court for an order to increase petitioner's monthly installments toward satisfaction of the fine to $1,250 a month.[3] The district court considered affidavits filed by the government and petitioner and, on September 21, 1965, entered an order increasing payments on the fine to $500 a month (R. 2a–4a). The court of appeals affirmed without opinion (R. 56a).

The affidavits show that, following petitioner's parole, he had an income of about $4,800 to $6,000 a

[2] Petitioner was released on parole on September 1, 1947. He has remained on parole to date because the bulk of his fine remains unpaid.

[3] The motion was made under the provisions of Section 5226 of the New York Civil Practice Law and Rules. Resort to state procedures for satisfaction of an outstanding fine is authorized by 18 U.S.C. 3565 and Rule 69 of the Federal Rules of Civil Procedure. The government subsequently reduced its demand to request payments of $1,000 a month (R. 24a–25a).

year (R. 9a). During this period, a home was bought in his wife's name for $18,000 (R. 27a).[4] About five years after petitioner was released from prison, he and his wife, with capital furnished by the wife, formed the Petal Sales Corporation, which sells specialty products of synthetic fabric and imitation leather (R. 8a, 18a). Petitioner's wife is president and sole stockholder of the corporation and petitioner is its secretary and principal employee (R. 7a, 10a, 19a, 27a–32a, 34a). Petitioner has served as general manager of the firm and its chief salesman in the United States and abroad. The corporation has grown from a small beginning to a business with annual gross sales of more than $3,000,000 (R. 8a, 19a, 21a). The success of the corporation is attributable almost exclusively to petitioner's efforts (R. 8a, 19a, 21a).

During the five years preceding the motion to increase petitioner's installment payments, petitioner reported annual salaries from the corporation of $14,504.31, $15,576.12, unknown, $14,229.42 and $17,679.10 (R. 7a, 20a, 28a). Although petitioner's wife comes to the office only twice a week (R. 7a), she reported a salary from the corporation for 1961 of $25,039.50—the same year petitioner reported $15,576.12 (R. 7a).

Petitioner owns no property in his own name and does not maintain a bank account (R. 34a–35a). The corporation pays his salary in cash and he conducts all of his personal affairs in cash (R. 40a). His busi-

[4] After indictment, petitioner transferred his interest in the family home and automobile to his wife. That residence was later sold and the present home purchased.

ness activities are conducted on a corporation expense account (R. 36a–38a). Petitioner's wife pays the premiums on his life insurance (R. 39a).

The record is fragmentary concerning petitioner's necessary expenses. His two sons are married and support themselves (R. 7a, 10a). Petitioner's wife, according to his testimony in December, 1962, supports herself (R. 32a–33a), although he also testified that he gave her $50 to $75 a week "house money" (R. 41a). Attempts at delineating petitioner's personal expenses in 1962 were largely inconclusive due to vague answers but did indicate that petitioner bought his own clothes and paid his son (now independent) $15 a week plus clothing money (R. 32a–33a, 35a–36a, 40a–43a).

ARGUMENT

1. Section 5226 of the New York Civil Practice Law and Rules provides that, where it is shown that a judgment debtor is receiving money from any source, the court shall order specified installment payments to the judgment creditor, taking into account, among other things, the reasonable requirements of the judgment debtor and his dependents. Under this section, there were ample facts before the district court to warrant the order requiring petitioner to pay $500 per month in satisfaction of his fine in this case. Petitioner was shown to have an income in excess of $17,000 a year; his wife has a salary of over $25,000 a year. Such evidence as appeared in the record concerning petitioner's requirements indicated that they are minor; petitioner has no dependent children and his business activities are conducted on the corpora-

tion expense account. The burden of producing information as to additional expenses, if any, was on petitioner (*Industrial Bank of Commerce* v. *Kelly*, 28 Misc. 2d 889, 215 N.Y.S. 2d 644 (Sup. Ct. Nassau Co.); *Matter of Rich* v. *Rich*, 183 Misc. 551, 555 (Sup. Ct. N.Y. Co.); *Adirondack Furniture Corp.* v. *Crannel*, 167 Misc. 599, 601–602, 5 N.Y.S. 2d 840, 843–844 (Saratoga Co. Ct.)), and this was particularly so where, as here, he has conducted all his personal finances on a cash only basis. Finally, the court gave petitioner the benefit of every doubt by increasing the "amount of the monthly installments to be paid by the judgment debtor to a figure that *conservatively* represents a payment that would *clearly* be fair to both the Government and the judgment debtor" (R. 3a) (emphasis added); in addition, the court expressly left it open for either party to move to increase or decrease the payments upon presentation of further facts (R. 3a).

2. Nor is there any merit to petitioner's suggestion that the present order violates the policy of the New York statute. The instant case is similar to *Frooks* v. *Clurman*, 76 N.Y.S. 2d 187, 188 (Sup. Ct. Kings Co.), affirmed, 266 App. Div. 859, 43 N.Y.S. 2d 861, where the judgment debtor worked for a corporation dominated by his wife for no salary. The court determined the services to be worth $250 a month and directed payment of $175 a month (70 per cent). It noted that the debtor's "wife's financial situation warrants the belief that he can afford to divert this much without the family suffering." See, also, *Economy Leases* v. *Bierman*, 159 Misc. 367, 286 N.Y. Supp. 733 (City Ct. N.Y. Co). Indeed, in this case, in addition

to his wife's substantial salary, it is undisputed that petitioner will still have an income of about $500 a month after he pays the installments directed by the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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